UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

PORTLAND DIVISION

CHEHALEM PHYSICAL THERAPY, INC. and SOUTH WHIDBEY PHYSICAL THERAPY AND SPORTS CLINIC, Plaintiffs, COVENTRY HEALTH CARE, INC., Defendant.	No. 09-cv-00320-HU **ORDER ON PLAINTIFF SOUTH WHIDBEY'S MOTION TO CERTIFY CLASS**

Arthur M. Murray
Stephen B. Murray
Stephen B. Murray, Jr.
Korey A. Nelson
MURRAY LAW FIRM
650 Poydras Street, Suite 2150
New Orleans, LA 70130

Diana E. Godwin
LAW OFFICE OF DIANA GODWIN
1500 N.E. Irving Street, Suite 370
Portland, OR 97232

Joseph Payne Williams, Sr.
Richard Bray Williams
WILLIAMS FAMILY LAW FIRM, LLC
162 Jefferson Street
Natchitoches, LA 71457

Steve D. Larson
Joshua L. Ross
STOLL STOLL BERNE LOKTING & SCHLACHTER, P.C.
209 S.W. Oak Street, Fifth Floor
Portland, OR 97204

Thomas A. Filo
COX COX FILO CAMEL & WILSON, LLC
723 Broad Street
Lake Charles, LA 70601

Attorneys for Plaintiffs

John F. McGrory, Jr.
DAVIS WRIGHT TREMAINE, LLP
1300 S.W. Fifth Avenue, Suite 2300
Portland, OR 97201-5630

Jennifer A. Adler
Lisa L. Heller
V. Robert Denham, Jr.
ROBINS KAPLAN MILLER & CIRESI, LLP
2600 One Atlanta Plaza
650 East Paces Ferry Road, N.E.
Atlanta, GA 30326

Attorneys for Defendant

HUBEL, Magistrate Judge:

This matter is before the court on motion of the plaintiff South Whidbey Physical Therapy and Sports Clinic ("South Whidbey") to certify an Injunctive Class under Federal Rule of Civil Procedure 23(a) and (b)(2). The motion is fully briefed, and the court heard oral argument on the motion on January 8, 2013.

Preliminarily, I will set out the standards for class certification, which provide the legal framework for consideration of the parties' arguments.

A. Class Action Standards

For purposes of ruling on a motion to certify a class, the court takes the substantive allegations of the Complaint as true, but also considers the nature and range of proof necessary to establish those allegations. *In re Coordinated Pretrial Proceedings in Petroleum Prods. Antitrust Litig.*, 691 F.2d 1335, 1342 (9th Cir. 1982) (citing *Blackie v. Barrack*, 524 F.2d 891, 901 & n.7

(9th Cir. 1975)). This analysis frequently "will entail some overlap with the merits of the plaintiff's underlying claim. That cannot be helped." *Wal-Mart Stores, Inc. v. Dukes*, ___ U.S. ___, 131 S. Ct. 2541, 2551, 180 L. Ed. 2d 374 (2011).

As the party seeking class certification, South Whidbey bears the burden of demonstrating compliance with each of the four requirements of Federal Rule of Civil Procedure 23(a); i.e., numerosity, commonality, typicality, and adequacy of representation. *See Lozano v. AT&T Wireless Servs., Inc.*, 504 F.3d 718, 725 (9th Cir. 2007); *see also* Dkt. #127, my order denying the plaintiffs' motion to certify a Damages Class, at p. 13[1]. In addition, South Whidbey must "establish an appropriate ground for maintaining class actions under Rule 23(b)." *Stearns v. Ticketmaster Corp.*, 655 F.3d 1013, 1019 (9th Cir. 2011); *Lozano*, *supra*. The provision of Rule 23(b) applicable to South Whidbey's motion to certify an Injunctive Class is subsection (2): "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole[.]" Fed. R. Civ. P. 23(b)(2).

The commonality, typicality, and adequacy-of-representation requirements "tend to merge" with one another in many respects, with all of them serving "as guideposts for determining whether under the particular circumstances maintenance of a class action is

[1]All page numbers cited in this order refer to the ECF pagination at the top of the document, which sometimes differs from the page number inserted by party filing the document. *See, e.g.*, Dkt. #197, where page 2 of the plaintiffs' brief falls on ECF p. 6.

economical and whether the named plaintiff's claim and the class claims are so interrelated that the interests of the class members will be fairly and adequately protected in their absence." *Dukes*, 131 S. Ct. at 2551 n.5; *see Comcast Corp. v. Behrend*, ___ S. Ct. ___, 2013 WL 1222646, at **4-5 (Mar. 27, 2013). In order to justify a departure from the "usual rule that litigation is conducted by and on behalf of the individual named parties only, . . . 'a class representative must be part of the class and "possess the same interest and suffer the same injury" as the class members.'" *Dukes*, 131 S. Ct. at 2550 (quoting *East Tex. Motor Freight Sys., Inc. v. Rodriguez*, 431 U.S. 395, 403, 97 S. Ct. 1891, 1896, 52 L. Ed. 2d 453 (1977), in turn quoting *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 216, 94 S. Ct. 2925, 2929, 41 L. Ed. 2d 706 (1974)).

Regarding the Rule 23(a) criteria, numerosity has never been at issue in this case. *See* Dkt. #127, pp. 16-17 & n.1. However, the defendant Coventry Health Care, Inc. ("Coventry") argues South Whidbey cannot establish the criteria of commonality and typicality, nor is South Whidbey a proper class representative. In addition, Coventry argues South Whidbey's proposed class does not meet the implied prerequisite "that the class be adequately defined and readily ascertainable." *Sacora v. Thomas*, 2009 WL 4639635, at *11 (D. Or. Dec. 3, 2009) (Marsh, J.) (citing *Davis v. Astrue*, 250 F.R.D. 476, 484 (N.D. Cal. 2008); *Oshana v. Coca-Cola Co.*, 472 F.3d 506, 513 (7th Cir. 2006); *DeBremaecker v. Short*, 433 F.2d 733, 734 (5th Cir. 1970)).

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B. Background Facts

The court and the parties are intimately familiar with the factual background of this case. In a nutshell, this case concerns the proper interpretation of the reimbursement provisions of preferred provider organization (PPO) agreements between the plaintiffs and First Health Group Corp. ("First Health"), a Coventry subsidiary. The plaintiffs contracted with First Health to participate in the First Health Provider Network - a PPO network maintained by First Health. The plaintiff Chehalem Physical Therapy, Inc. ("Chehalem") entered into a First Health Network Participating Clinic Agreement ("Provider Agreement") in July 1998. It terminated its Provider Agreement prior to filing this lawsuit. South Whidbey entered into a similar Provider Agreement in January 2007, and its Provider Agreement remains in effect.

At issue in this case is whether Coventry has properly calculated the amount of reimbursements payable to the plaintiffs for workers' compensation medical services under the terms of the Provider Agreements. The reimbursement provision of the Provider Agreement entered into by each of the plaintiffs provides, in pertinent part:

> **§4.2 Reimbursement Procedure**
>
> The rules and procedures for reimbursement under this Agreement are as follows:
>
> (a) Pursuant to each Payor's Payor Agreement with First Health, Payor shall be liable for the lesser of Provider's billed charges or the amount set forth in Appendix A of this Agreement, less amounts of any copayments, deductibles, and coordination of benefits, when Covered Medical Services are provided to a Participating Patient.

> (b) In no case shall reimbursement exceed Provider's billed charges.

Appendix A is different for each of the plaintiffs' Provider Agreements. South Whidbey's Appendix A provides, in pertinent part, as follows:

> A. Services shall be reimbursed at **90% of the amounts specified in 2005 Medicare Fee Schedules** as adjusted and supplemented by First Health, except for those services defined under Sections B or C below. [Sections B and C specify particular rates for the provision of Anesthesia services and Durable Medical Equipment. Section D further specifies how these services are billed.]
>
> E. Reimbursement from Workers' Compensation Payors for services rendered to occupationally ill/injured employees shall be the lesser of the amounts specified in Sections A, B, C and D above or **80%** of the amount specified as the maximum amount payable under any related state or federal law or regulation pertaining to payment for such services or the usual and customary fee for the services as established by First Health or Payor. This rate of reimbursement shall apply whether such rules or guidelines are in existence at the time of execution of this agreement or established at a later time.
>
> * * *
>
> G. In no case shall reimbursement exceed Provider's usual and customary charge for the services rendered.

Dkt. #199-1, p. 16 (emphasis in original).

The plaintiffs claim that whenever a provider submits a bill for workers' compensation medical services that is less than the amount specified by the applicable state workers' compensation fee schedule (after application of any applicable state rule or guidelines), Coventry's MCPS system impermissibly recommends taking

the applicable PPO discount off of the actual billed charge. The plaintiffs claim this practice is a breach of their Provider Agreements.

C. South Whidbey's Motion to Certify Class

South Whidbey seeks to certify, and to act as class representative for, a class (referred to herein as the "Injunctive Class") consisting of:

> all health care providers who have a First Health PPO Provider Agreement with a Workers' Compensation National Rate Code associated with Target Rate Codes PT3 and RB9. Excluded from the class are physical therapists, physical therapy clinics, or health care providers in the state of Louisiana.

Dkt. #196, p. 2.

In my order of January 2011, denying the plaintiffs' motion to certify a Damages Class, I described Coventry's procedure of assigning a National Rate Code ("NRC") to the services provided by the providers, and how the various NRCs negotiated by a provider are bundled into a Target Rate Code ("TRC"). *See* Dkt. #127, pp. 6-7. South Whidbey states the TRC assigned to Chehalem's contract is PT3, and the TRC assigned to South Whidbey's contract is RB9. South Whidbey explains, "[T]he NRC is the rate that applies to the service the provider provides. . . . [Coventry] will assign the same NRC to a particular contract's rate if it is one that has been previously negotiated by a provider. If no previous matching NRC exists, [Coventry] assigns the rate a new NRC." Dkt. #197, p. 7.

South Whidbey goes on to explain that "TRCs are 'essentially the bundle of NRCs negotiated by the provider for the various classes of service' such as workers' compensation." *Id.* (quoting

the court's Order denying the plaintiffs' motion to certify a Damages Class, Dkt. #127, at 6). "As with NRCs, [Coventry] will determine whether the combination of NRCs negotiated in an agreement match an existing TRC and, if so, that existing TRC is assigned to the Appendix A in which the rates (which have been assigned NRCs) are set out. 'For an existing TRC to be used, the match must exist for all products, state rules, and any other pricing rules associated with that TRC.'" *Id.* (quoting Dkt. #127, at 6-7).

South Whidbey maintains that by limiting the Injunctive Class to providers who have been assigned the same TRCs as the plaintiffs, "the court can be assured that the rates and operative language contained in every single Appendix A will be identical." Dkt. #197, p. 8. South Whidbey asserts this is true because when Coventry "offers a provider a template or form contract, and the provider accepts that contract with no changes, the TRCs 'will use the [NRCs] for that grouping of products consistent with the template.'" *Id.* (quoting Decl. of Maureen Sample dated 08/10/10, Dkt. #86, ¶ 17).

In addition, South Whidbey claims Coventry is able to identify all of the NRCs that make up the two TRCs listed in the class definition, as well as all of the provider's bills that were discounted pursuant to those NRCs. According to South Whidbey, this will ensure that all class members "have the same form 'lesser of' language in their contracts that has been the focus of the lawsuit; specifically, language providing for a discount for Workers' Compensation services of the lesser of 80% of the maximum

amount payable under state or federal workers' compensation laws or regulations." *Id.*

South Whidbey further claims it makes no difference if Appendix A to various class members' contracts also contains other "lesser of" payment options, because South Whidbey seeks injunctive relief *only* for "the circumstance in which a bill is discounted based on that specific 'lesser of' the billed charge or 80% of the State Fee Schedule Maximum language." *Id.*, n.2. Other discounting provisions that may be included in a class member's Appendix A would not be subject to the injunction South Whidbey seeks in this lawsuit. *Id.*

Moreover, South Whidbey asserts, defining the class by referencing the two specific TRCs will allow the court to fashion an appropriate injunction, and to enforce it, because, again according to South Whidbey, Coventry is able to determine electronically "which provider bills were discounted using the NRCs that are within TRCs RB9 and PT3 without the need to locate and review paper contracts." Dkt. #17, p. 9.

Coventry takes issue with South Whidbey's claims regarding the ease of identifying prospective class members. First, Coventry notes the TRCs identified in South Whidbey's proposed class definition are incomplete. According to Coventry, Chehalem's TRC is ORPT3, not PT3, and South Whidbey's TRC is WARB9, not RB9. Coventry represents that the TRCs RB9 and PT3 do not exist. Each TRC is state-specific, with a state designator, "and a state's TRC is unique to that state, in accordance with that state's rules and regulations." Dkt. #204, p. 18. In addition to TRCs varying by

state, Coventry argues there also may be more than one version of the TRC within each state. *Id.*

Coventry argues further that even within a single state, "a TRC cannot be used to accurately identify providers that have, or had, identical NRCs." *Id.*, p. 19. For example, Coventry indicates an NRC within a TRC may change "either when a provider renegotiates one of its rates, or adds or deletes a product, but the original TRC designator assigned to that provider does not get changed in Coventry's records." *Id.*, pp. 18-19. Coventry maintains that "TRCs are not reliable as a means to identify the reimbursement rates of a provider." *Id.*, p. 18.

Coventry further argues variations in providers' contract methodologies, state regulatory schemes, and payment regulations for different categories of providers, all preclude a finding of commonality and typicality between members of the proposed class. According to Coventry, "South Whidbey's [Andrew] Goetz even admitted that he could represent only physical therapy providers in Washington state because of these variations." *Id.*, p. 20. Coventry also maintains South Whidbey's proposed class lacks the type of cohesiveness required to satisfy Rule 23(b)(2). Coventry notes the court previously found Chehalem's proposed Damages Class "did not satisfy the predominance and superiority requirements of Rule 23(b)(3)," and Coventry argues the same analysis applies to show South Whidbey's class does not satisfy the requirements of Rule 23(b)(2). *Id.*, pp. 24-25.

Coventry also challenges South Whidbey's adequacy as class representative. Coventry argues Goetz's declaration, in which he indicates he would pursue the class claims vigorously and assist

class counsel in a meaningful way, contradicts his deposition testimony. Coventry argues it "has shown that Mr. Goetz is 'startlingly unfamiliar' based on his total lack of knowledge about this case." *Id.*, pp. 21-22, n.9 (citing, *inter alia*, *Moeller v. Taco Bell Corp.*, 220 F.R.D. 604, 611-12 (N.D. Cal. 2003), for the proposition that "a plaintiff will be deemed inadequate if he or she is 'startlingly unfamiliar' with the case'").

In addition, Coventry argues certification of a class under Rule 23(b)(2) would be improper because a single injunction would not provide relief to the proposed class members, due to their disparate factual and legal circumstances. Dkt. #204, pp. 25-30. Coventry asserts this is borne out by the court's finding that the contract language at issue is inherently ambiguous, and under Illinois law, which controls here, the ambiguity cannot be resolved absent the jury's consideration of extrinsic evidence of the parties' intent. Coventry argues this is an inherently individualized consideration as to each provider, even those who simply accepted a standard form contract without further negotiation. Coventry maintains this individualized inquiry eliminates the ability to try the issue on a class basis. *Id.*

In reply, South Whidbey argues it is not necessary to list every state designation in the class definition, such as ORPT3 for the PT3 designation in Oregon, or WARB9 for the RB9 designation in Washington, and doing so would be repetitive and unnecessary. South Whidbey argues the implication in its proposed class definition "is that the state designation is automatically included in those states where RB9 and PT3 are used." Dkt. #207, p. 11 (noting

the proposed class definition specifically excludes providers in Louisiana).

South Whidbey further claims Coventry's assertion that TRCs are not a reliable means of identifying a provider's reimbursement rates "almost defies response." *Id.*, p. 12. South Whidbey agrees that the workers' compensation fee schedules, rules, and guidelines may differ from state to state, and the percentage discount applied to various contracts between providers and Coventry also may differ. However, South Whidbey argues "the uniting factor among providers with contracts with TRCs RB9 and PT3" is Coventry's ongoing miscalculation of the "lesser of" reimbursement amount.

The court first addresses Coventry's reassertion at oral argument that the new class definition fails to take into account the court's decision that the contract at issue is ambiguous and requires extrinsic evidence to determine the parties' intent, which has to be an individualized determination. As I noted in my order denying the plaintiffs' motion to amend their Complaint, I never held the jury will have to examine extrinsic evidence in order to interpret the contract. As I explained in that order, my holding was based on the four corners of the Appendix A language. I held, "[T]he jury's task will be to resolve the ambiguity by construing the contract 'in accordance with the ordinary expectations of reasonable people.'" Dkt. #186, p. 5 (quoting *Carey v. Richards Bldg. Supply Co.*, 856 N.E.2d 24, 28 (Ill. App. Ct. 2006); citations omitted). I further noted, "The jury *may* examine parol evidence to resolve the ambiguity in the language, and determine 'what a reasonable person would take the agreement to mean.' . . . The contract then will be enforceable pursuant to the jury's

interpretation." *Id.* (citations omitted; emphasis added). Thus, Coventry's argument that class consideration fails due to such an individualized inquiry is unavailing.

It also bears mentioning here that the extrinsic evidence the parties can be expected to offer at trial likely will have little impact on the jury's interpretation of the contract language in question. It can be expected that South Whidbey representatives (and representatives from any other class members who may testify) will maintain they did not understand that their billed charge could be discounted if the billed charge was less than the state fee schedule maximum. Similarly, Coventry representatives can be expected to testify that a common-sense reading of the Appendix A language supports Coventry's reimbursement calculations. Faced with this type of conflicting testimony, the jury will arrive back at the contract language itself, which the jury must construe "in accordance with the ordinary expectations of reasonable people." *Carey*, 856 N.E.2d at 28.

Turning to South Whidbey's proposed class definition, the court agrees it is not necessary to list every state designation. However, the court further finds the RB9 and PT3 designations would lack the necessary precision to define the class in any states other than Oregon and Washington. For example, the TRC applicable to South Whidbey's contract is WARB9. As Coventry's witnesses have explained, the "RB" indicates there is a Medicare component in the pricing formula, and this "RB" designation is the same in all states. However, the number "9" used in connection with the WARB9 TRC indicates this is the ninth version of the contract with the Medicare component for the state of Washington. The "RB" contract

in another state (signifying that state's version of the contract with a Medicare component) might only be the seventh version of that contract (such as, hypothetically, "CARB7"), or that state may be using the 200th version (e.g., "CARB200"). Thus, there may be states that have another RB designation, yet still have providers with contracts identical to South Whidbey's. The only state within which the RB9 designation is relevant for purposes of South Whidbey's proposed class definition is Washington. The same holds true for the PT3 designation on Chehalem's contract, which would apply only to physical therapists in the state of Oregon who have the PT3 designation on their contracts. Nevertheless, this problem with South Whidbey's proposed class definition is not necessarily fatal to South Whidbey's motion to certify an Injunctive Class. The court is not bound by the class definition proposed, and may modify the class definition to make it sufficiently definite. *See, e.g.*, *Robidoux v. Celani*, 98 F.2d 931, 937 (2d Cir. 1993); *Holman v. Experian Info. Solutions, Inc.*, 2012 WL 1496203, at *8 (N.D. Cal. Apr. 27, 2012) (quoting *In re Monumental Life Ins. Co.*, 365 F.3d 408, 414 (5th Cir. 2004)).

South Whidbey further argues it has met its burden to show commonality at this stage of the lawsuit because it has shown the existence of a common legal issue or factual predicate. South Whidbey asserts Coventry "is attempting to import the law on pre-dominance, required in a [Rule 23(b)(3)] damages class, into the commonality requirement of 23(a)." *Id.*, p. 14 (citing *Walters v. Reno*, 145 F.3d 1032, 1047 (9th Cir. 1998)).

The class analysis in *Walters v. Reno*, the case cited by South Whidbey, is instructive in the present case. In *Walters*, aliens

sued the federal Immigration and Naturalization Service ("INS," now known as U.S. Citizenship and Immigration Services), alleging certain administrative procedures employed by the agency violated the aliens' constitutional right to procedural due process. Specifically, the aliens challenged the form of notice of deportation procedures the INS served on aliens charged with document fraud. The aliens argued the notice forms were dense, written in complex legal language, and failed to inform them adequately of the steps required to contest the charges, including how to obtain a hearing, and the consequences of failing to request a hearing. *Walters*, 145 F.3d at 1036. The aliens moved for certification of "a class of approximately 4,000 aliens who had been or were subject to final orders." *Id.* They sought an injunction and order "requiring the INS to reopen each plaintiff's document fraud case and provide hearings if necessary." *Id.*

The government challenged the district court's certification of the class, arguing commonality was lacking because individual class members' experiences were not sufficiently similar. Among other things, the government pointed to terms of the injunction which provided the government with the opportunity to show an individual class member had received adequate notice despite having received the offending notice forms. The government argued the availability of such individualized proceedings demonstrated the lack of commonality.

The court found the government had missed the point, holding the district court properly presumed "that the INS actually employed its constitutionally deficient policies and procedures." *Id.*, 145 F.3d at 1045-46. The court noted, "as the district court

observed, it would be 'a twisted result' to permit an administrative agency to avoid nationwide litigation that challenges the constitutionality of its general practices simply by pointing to minor variations in procedure among branch offices and individual INS agents, particularly because the variations were designed to avoid the precise constitutional inadequacies identified by the plaintiffs in this action." *Id.*, 145 F.3d at 1046. The court also observed:

> The government further argues that commonality is nonexistent on account of factual distinctions in the class members' underlying claims. Differences among the class members with respect to the merits of their actual document fraud cases, however, are simply insufficient to defeat the propriety of class certification. What makes the plaintiffs' claims suitable for a class action is the common allegation that the INS's procedures provide insufficient notice. *See Forbush v. J.C. Penney Co., Inc.*, 994 F.2d 1101, 1106 (5th Cir. 1993) (noting that the need for subsequent individual proceedings, even complex ones, "does not supply a basis for concluding that [the named plaintiff] has not met the commonality requirement").

Walters, 145 F.3d at 1045-46. *See Rodriguez v.* Hayes, 591 F.3d 1105, 1122 (9th Cir. 2010) ("the commonality requirements ask[] us to look only for some shared legal issue or a common core of facts") (citing, *inter alia*, *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1019 (9th Cir. 1998) (noting the Rule 23(a) commonality requirement is construed "permissively" in the case of an injunctive class, where "[t]he existence of shared legal issues with divergent factual predicates is sufficient, as is a common core of salient facts coupled with disparate legal remedies within the class")).

Specifically regarding certification of an injunctive class pursuant to Rule 23(b)(2), the *Walters* court noted the plaintiffs were challenging procedures used by the INS on a nationwide basis, and the plaintiffs sought injunctive, rather than monetary, relief. The government once again pointed to the individual proceedings that would result from the injunction "as evidence that judicial efficiency will actually be undermined by the class action." *Id.*, 145 F.3d at 1047. The court noted "the district court's decision eliminates the need for individual litigation regarding the constitutionality of INS's official forms and procedures. Absent a class action decision, individual aliens across the country could file complaints against the INS in federal court, each of them raising precisely the same legal challenge to the constitutionality of the . . . forms." *Id.* Thus, the court held class certification furthered Rule 23's general purpose of "avoiding duplicative litigation." *Id.*

The *Walters* court further observed:

> We note that with respect to 23(b)(2) in particular, the government's dogged focus on the factual differences among the class members appears to demonstrate a fundamental misunderstanding of the rule. Although common issues must predominate for class certification under Rule 23(b)(3), no such requirement exists under 23(b)(2). It is sufficient if class members complain of a pattern or practice that is generally applicable to the class as a whole. Even if some class members have not been injured by the challenged practice, a class may nevertheless be appropriate. *See* 7A Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice & Procedure* § 1775 (2d ed. 1986) ("All the class members need not be aggrieved by or desire to challenge the defendant's conduct in order for some of them to seek relief under Rule 23(b)(2)."); *see also Adamson v. Bowen*, 855 F.2d 668, 676 (10th Cir. 1988) (emphasizing

> that although "the claims of individual class members may differ factually," certification under Rule 23(b)(2) is a proper vehicle for challenging "a common policy").

Id.

A strikingly similar analysis is appropriate in the present case. Here, as in *Walters*, the putative members of the proposed Injunctive Class are challenging a widespread *procedure* that is "generally applicable to the class as a whole." *Walter*, 145 F.3d at 1047. As would have been the case in *Walters*, if individual aliens could file lawsuits challenging the same INS form, here, absent suit on a class basis, each individual provider with the same contract language could file a lawsuit challenging the identical procedure used by Coventry in calculating the appropriate reimbursement amount. These multiple lawsuits easily could lead to conflicting resolutions, despite the presence of identical factual and legal issues. Rule 23(b) "does not require us to examine the viability or bases of class members' claims for declaratory and injunctive relief, but only to look at whether class members seek uniform relief from a practice applicable to all of them." *Rodriguez*, 591 F.3d at 1125; *see Dukes*, 131 S. Ct. at 2551 ("'What matters to class certification . . . is not the raising of common "questions" - even in droves - but, rather the capacity of a classwide proceeding to generate common *answers* apt to drive the resolution of the litigation.'") (quoting Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U.L. Rev. 97, 132 (2009)).

"A class is ascertainable if it identifies a group of unnamed plaintiffs by describing a set of common characteristics sufficient

to allow a member of that group to identify himself or herself as having a right to recover based on the description. . . . The identity of class members must be ascertainable by reference to objective criteria." *Vietnam Veterans of Am. v. C.I.A.*, 288 F.R.D. 192, 211 (N.D. Cal. 2012) (internal quotation marks, citations omitted). The Tenth Circuit has noted that, in particular, a 23(b)(2) is well suited to cases where the composition of the class is not readily ascertainable. Indeed, "while the lack of identifiability is a factor that may defeat Rule 23(b)(3) class certification, such is not the case with respect to class certification under Rule 23(b)(2)." *Shook v. El Paso County*, 386 F.3d 963, 972 (10th Cir. 2004) (citing *Yagge v. Powers*, 454 F.2d 1362, 1366 (1st Cir. 1972) (holding actual class membership need not be "precisely delimited" because notice to the members of a 23(b)(2) class is not required); *see Walters*, 145 F.3d at 1047 (citing *Adamson v. Bowen*, 855 F.2d 668, 676 (10th cir. 1988) "(emphasizing that although 'the claims of individual class members may differ factually,' certification under rule 23(b)(2) is a proper vehicle for challenging 'a common policy')").

The court finds that with some minor changes, the previous Injunctive Class definition proposed by the plaintiffs more appropriately defines a group of providers with common characteristics that would allow members of that group to identify themselves as having a right to recover based on the description. The court therefore finds it is appropriate to certify the following Injunctive Class:

> All health care providers who have a First Health PPO Provider Agreement with a reimbursement procedure providing for the payment

> of the lesser of (a) the billed charge, or (b) a discount based on a percentage of the maximum payable amount under the applicable state's workers' compensation fee schedule (after application of any applicable state rules or guidelines) (hereafter referred to as the "fee schedule maximum"), and who have had a deduction from the billed charge when that charge was less than the fee schedule maximum. Excluded from the class are health care providers in the state of Louisiana.

This class definition fits the parameters for an injunctive class as discussed by the *Walters* Court. Members of the class will have contracts specifying similar reimbursement guidelines. Each class member will have had a discount taken from a billed charge when the billed charge was less than the state fee schedule maximum. The jury's decision as to whether such a discount is proper under the contract language will control every instance when a provider submits a billed charge that is less than the applicable fee schedule maximum. If the jury finds Coventry's method of calculating these reimbursements is flawed, an appropriate injunction will govern every such instance, without regard to other factual differences that may exist between the providers and other contract provisions. Proceeding on a class basis will eliminate the need for individual litigation involving the same, or substantially similar, factual and legal issues. In addition, just as the government in *Walters* had the ability to show some aliens actually received adequate notice despite the deficient procedures, here, Coventry will have the ability to show (if, indeed, it can) that some providers actually understood, and assented to, a contractual interpretation that allowed a discount off their billed charge when the billed charge was less than the fee schedule maximum. "Differences among the class members with respect to the

merits of their actual . . . cases, however, are simply insufficient to defeat the propriety of class certification." *Walters*, 145 F.3d at 1046.

The court is not wholly unsympathetic to the difficulties Coventry may face in identifying providers who have contracts of the type specified in the class definition, which will be required if the jury agrees with the plaintiffs' interpretation of the contract language. However, it is notable that if Coventry is found to have breached the contract as the plaintiffs claim, the calculation errors constituting such a breach would be of Coventry's own making, and not due, in any way, to any of the providers' actions. Coventry has constructed a labyrinthian system to review providers' bills that has led to the very misunderstanding, and conflicting interpretations, underlying this lawsuit. If the jury finds Coventry's practices are breaching the Provider Agreements, then as a practical matter, Coventry may have to change its practices across the board to avoid the possibility of violating the ensuing injunction. If the jury finds Coventry has breached the contract, the most appropriate type of injunction will be broadly written to leave the method of compliance, and the burden of complying, up to Coventry. That discussion is left for another day, after the jury has interpreted the contract language at issue.[2]

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[2]Indeed, a discussion of how members of the class may be ascertained is not required at this stage of the case. *Cf. Sykes v. Mel Harris and Assocs., LLC*, 285 F.R.D. 279, 287 (S.D.N.Y. 2012 ("Although the membership of the class must be ascertainable at some point in the case, it does not necessarily have to be determined prior to class certification.") (internal quotation marks, citations omitted); *Sorenson v. Concannon*, 893 F. Supp.

Coventry further argues the plaintiffs have an adequate remedy at law in the form of damages, making injunctive relief inappropriate. In addition, the Provider Agreements, themselves, contain a dispute resolution procedure. Coventry asserts that if an individual claim is compensable in damages, a party is not entitled to an injunction, and the same should hold true on a class basis. The court disagrees that there is an "adequate" remedy at law for the challenged practice going forward. The plaintiffs are seeking an injunction to prevent future conduct that is allegedly widespread, and allegedly will continue unabated absent an injunction. Coventry would have each provider file suit, monthly or annually if necessary, to vindicate ongoing erroneous calculations of their reimbursement amounts. As discussed above, maintaining this action on a class basis will prevent innumerable lawsuits challenging exactly the same contract interpretation, and the attendant potential for inconsistent results.

As noted above, Coventry also challenges the adequacy of South Whidbey as class representative, arguing Mr. Goetz is "startlingly unfamiliar" with the case. This argument is belied by the record in this case. Mr. Goetz has demonstrated an adequate understanding of the facts underlying South Whidbey's claim, and has affirmed his commitment to working with his counsel as class representative. The plaintiffs' attorneys are well qualified, and South Whidbey's interests are not antagonistic to the interests of the class as a whole. Particularly in light of the low threshold of knowledge required for a class representative, *see, e.g., Morelock Enters.*,

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1469, 1479-80 (D. Or. 1994) (Jones, J.) (noting actual class members often are not known until the final claims process).

Inc. v. Weyerhaeuser Co., 2004 WL 2997526, at *4 (D. Or. Dec. 16, 2004) (Panner, J.) ("The threshold of knowledge required of a Class Representative is not particularly high."); *Moeller v. Taco Bell Corp.*, 220 F.R.D. 604, 611-12 (N.D. Cal. 2004) ("The threshold of knowledge required to qualify a class representative is low[.]"), the court finds South Whidbey is an adequate representative of the proposed Injunctive Class.

For these reasons, South Whidbey's motion (Dkt. #196) for certification of an Injunctive Class is **granted**. An Injunctive Class is hereby certified, defined as follows:

> All health care providers who have a First Health PPO Provider Agreement with a reimbursement procedure providing for the payment of the lesser of (a) the billed charge, or (b) a discount based on a percentage of the maximum payable amount under the applicable state's workers' compensation fee schedule (after application of any applicable state rules or guidelines) (hereafter referred to as the "fee schedule maximum"), and who have had a deduction from the billed charge when that charge was less than the fee schedule maximum. Excluded from the class are health care providers in the state of Louisiana.

IT IS SO ORDERED.

Dated this 16th day of April, 2013.

/s/ Dennis J. Hubel

Dennis James Hubel
Unites States Magistrate Judge